IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAURINE E. LAPINSKY	:	CIVIL ACTION
	:	
v.	:	
	:	
AMTRAK COMMUTER SERVICES CORP., ET AL.	:	NO. 99-3575

MEMORANDUM & ORDER

Hutton, J. February 28,2001

Presently before this Court are Defendant National Railroad Passenger Corporation's Motion for Summary Judgment and accompanying Memorandum of Law (Docket No. 18), Defendant Transportation Communications International Union's Motion for Summary Judgment (Docket No. 14) and accompanying Memorandum of Law (Docket No. 15), Plaintiffs' Response to Defendant National Railroad Passenger Corporation's Motion for Summary Judgment (Docket No. 20), Plaintiffs' Response to Defendant Transportation Communications International Union's Motion for Summary Judgment (Docket No. 21), Defendant Transportation Communications International Union's Reply Memorandum of Law (Docket No. 24) and Defendant National Railroad Passenger Corporation's Reply Memorandum of Law (Docket No. 25). For the following reasons, Defendants' Motions are **GRANTED in part and DENIED in part.**

I. Background

Plaintiff Laurine Lapinsky ("Lapinsky") is employed by the National Railroad Passenger Corporation ("Amtrak") as a clerical employee and is a member of the Transportation Communications

International Union (the "Union" and collectively, the "Defendants").[1] Lapinsky currently is on a medical leave of absence.[2] Lapinsky alleges in her Complaint that Amtrak discriminated against her in connection with her bid for the position of Clerk Typist. Lapinsky claims Amtrak discriminated against her based on an alleged disability, in violation of the Americans with Disabilities Act (the "ADA") and the Pennsylvania Human Relations Act (the "PHRA"). Lapinsky has also alleged that her collective bargaining representative, the Union discriminated against her on the same grounds. Lapinsky's alleged disability involves nerve damage in her right hand and arm stemming from a car accident. Lapinsky also alleges that the Union breached a fiduciary duty to her by failing to waive the typing test and, that by doing so, the Union engaged in self dealing.

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The

[1] Although Lapinsky named Defendant in this matter "Amtrak Commuter Services Corporation d/b/a Amtrak," the correct name of Plaintiff's employer is the National Railroad Passenger Corporation.

[2] Although Lapinsky's Complaint initially named her husband, Michael Lapinsky, as a Plaintiff in this lawsuit, his claims were voluntarily dismissed.

party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Ultimately, the moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. See id. at 325. Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. See id.

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992). The

court's inquiry at the summary judgment stage is the threshold inquiry of determining whether there is need for a trial, that is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. See Anderson, 477 U.S. at 250-52. If there is sufficient evidence to reasonably expect that a jury could return a verdict in favor of plaintiff, that is enough to thwart imposition of summary judgment. See id. at 248-51.

III. Plaintiff's ADA Claim

Count I of Lapinsky's Complaint alleges Defendants violated the ADA by discriminating against Lapinsky due to her disability. See Pl.['s] Complaint, ¶ 50. A plaintiff presents a prima facie case of discrimination under the ADA by demonstrating: (1) she is a disabled person within the meaning of the ADA; (2) she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) she has suffered an otherwise adverse employment decision as a result of discrimination. See Gaul v. Lucent Technologies, 134 F.3d 576, 580 (3d Cir. 1998).

A. DISABILITY UNDER THE ADA

Under the ADA, the definition of "disability" is divided into three parts. 42 U.S.C. § 12102(2) (West 2000). An individual must satisfy at least one of these parts in order to be considered an individual with a disability. Id. The term "disability" is

defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2)(A)-(C); 29 C.F.R. § 1630.2(g)(1)-(3) (West 2001); Shannon v. City of Philadelphia, Civ.A. 98-5277, 1999 WL 1065210, *2 (E.D. Pa. Nov. 23, 1999).

Prong "C" requires the Court to determine whether each Defendant regarded Lapinsky as having an impairment and whether the impairment, as perceived by each Defendant, would have substantially limited one or more of Lapinsky's major life activities.[3] Lapinsky's actual impairment, therefore, is of no

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[3] With the "regarded as" prong, Congress chose to extend the protections of the ADA to individuals who have no actual disability. The primary motivation for the inclusion of misperceptions of disabilities in the statutory definition was that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." See 29 C.F.R. pt. 1630, app. § 1630.2(l) (EEOC's "Interpretive Guidance" to the ADA) (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987)).

The limited legislative history also confirms that Congress's primary concern in enacting the "regarded as" prong of the ADA was for individuals with no limitations but who, because of some non-limiting impairment, are prevented from obtaining employment as a result of societal prejudices. As the final House Report provides:

> The rationale for this third test [the "regarded as" prong] as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in School Board of Nassau County v. Arline. The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reactions of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." The Court concluded that, by including this test, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."

H.R.Rep. No. 101-485(III) (1990) at 30, reprinted in, 1990 U.S.C.C.A.N. 445, 453 ("House Judiciary Report") (footnotes omitted).

consequence to this analysis. See Deane v. Pocono Medical Center, 142 F.3d 138, 143 (3d Cir. 1998).

The EEOC Regulations[4] provide that an individual is "regarded as" being disabled if he or she:

> (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
> (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or
> (3) has none of the impairments defined in paragraph (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.[5]

Here, Lapinsky raises a genuine issue of material fact whether she is regarded as being disabled by Amtrak, i.e., whether she has a physical or mental impairment that does not substantially limit

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[4] Because the ADA does not define many of the pertinent terms, the Court is guided by the Regulations issued by the Equal Employment Opportunity Commission ("EEOC") to implement Title I of the Act. See 42 U.S.C. § 12116 (West 2000) (requiring the EEOC to implement said Regulations). Regulations such as these are entitled to substantial deference. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Blum v. Bacon, 457 U.S. 132, 141 (1982); Helen L. v. DiDario, 46 F.3d 325, 331-32 (3d Cir. 1995).

[5] 29 C.F.R. § 1630.2(h) defines "physical or mental impairment" as:

> (1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
> (2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. S 1630.2(l); see also H.R.Rep. No. 101-485(II), at 53 (1990)("House Labor Report"), reprinted in 1990 U.S.C.C.A.N. 303, 335; House Judiciary Report at 29, reprinted in 1990 U.S.C.C.A.N. at 452. Common to each definition is the requirement that the individual not in fact have an impairment that, absent the misperceptions of others, would substantially limit a major life activity. See

major life activities but is treated by a covered entity as constituting such limitation. Both Lapinsky Plaintiff and Thomas Mulvey, Manager of Employee Standards, have testified that Amtrak's medical department told them that they considered Lapinsky to be disabled. See Lapinsky Depo., March 31, 2000, at 66; Mulvey Depo., June 23, 2000, at 37-38; Pl['s] Memo. of Law in Opp'n to Def. Nat'l R.R., Exhibit K. Lapinsky stated in her deposition that "they said I had a disability." See Lapinsky Depo., at 66. In referring to "they," Lapinsky's deposition indicates that she was referring to Defendant Amtrak's medical department. See id. at 62-63, 65. In addition, Lapinsky testified that she offered to take the typing test, however, Mr. Mulvey told her "it would only show [her] disabilities, not [her] capabilities." See Lapinsky Depo., at 61. Mulvey testified that he communicated with Dr. Haase, an Amtrak doctor ("Haase"), about medical information that Mulvey sent to Haase concerning Lapinsky. See Mulvey Depo., at 38. Mulvey testified that Haase indicated that Lapinsky's request for accommodation "seemed to be reasonable and that there could be probably some type of a reasonable accommodation under the ADA." See id. at 38. Because Lapinsky has put forth evidence that she was regarded as disabled by Defendant Amtrak, the Court concludes that Lapinsky raises a genuine issue of material fact whether Lapinsky has a physical or mental impairment that does not substantially limit major life activities but is treated by Amtrak

as constituting such limitation. As a result, summary judgment is denied on this issue.

The Court must also examine Lapinsky's claim with respect to the Union. In her response to the Union's Motion for Summary Judgment, Lapinsky adopts and incorporates her response to Defendant Amtrak's Motion fo Summary Judgment. See Pl[‘s] Memo. of Law in Opp'n to Union's Mot. for Summ. J., at 14-15. In Lapinsky's response to Defendant Amtrak, however, she fails to raise a genuine issue of material fact whether the Union Defendant regarded Lapinsky as disabled. As a result, the Court must grant summary judgment on the issue whether the Union regarded Lapinsky as disabled.

Alternatively, Lapinsky argues that she is disabled because she is substantially limited in the major life activities of performing manual tasks and working. See Pl.[‘s] Memo. of Law in Opp'n to Def. Nat'l R.R. Passenger Corp.'s Mot. for Summ. J., at 17-21. Under the ADA, The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." See 42 U.S.C. § 12102(2).

Under the regulations promulgated by the Equal Employment Opportunity Commission ("EEOC"), a "physical impairment" includes "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the

following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 C.F.R. § 1630.2(h)(1) (West 2001).

The term "substantially limits" means "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." Id. § 1630.2(j)(1). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 163.2(i)(West 2001).

Determining whether a person has a disability under these ADA standards requires an individualized inquiry. See Bragdon v. Abbott, 524 U.S. 624, 641-42,(1998) (declining to consider whether HIV infection is a per se disability under the ADA); 29 C.F.R. § 1630.2(j) (determination of whether individual has disability not based on name or diagnosis of impairment but on effect of impairment on life of the individual). Courts in the Third Circuit follow the two step process suggested by the EEOC's interpretive

guidelines for determining whether an individual's ability to perform a major life activity has been significantly impaired. See Mondzelewski, 162 F.3d at 783 (citing 29 C.F.R. Pt. 1630, App. § 1630.2(j)). Under this analysis, the Court must first determine whether Lapinsky is significantly impaired in a life activity other than working. Id. Only if the answer to this question is negative does the court move to the second step of determining whether Lapinsky is significantly impaired in the life activity of working. Id.

When considering impairments of activities other than working, the inquiry is directed at examining the plaintiff's ability in comparison with the "average person in the general population." Mondzelewski, 162 F.3d at 783; 29 C.F.R. § 1630.2(j)(1)(i). In determining whether a disability qualifies as a substantial limitation of a major life activity, courts consider: "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact, or the expected permanent or long term impact of or resulting from the impairment." Gordon v. E.L. Hamm & Assoc., Inc., 100 F.3d 907, 911 (11th Cir. 1996). Remedial measures or devices are considered in the "substantially impaired" analysis. See Sutton, 119 S.Ct. at 2147-49.

Performing manual tasks is recognized as a major life activity. Here, Lapinsky was involved in an automobile accident in

August 1995 that caused injury to her right hand. See Pl.[‘s] Memo. of Law in Opp’n to Def. Nat’l R.R. Passenger Corp.’s Mot. for Summ. J., at 17. She suffered permanent nerve damage as well as other injuries. See id. Lapinsky testified during her deposition that she is limited in performing certain activities in her daily life such as bowling, ceramics and gardening. See Lapinsky Depo. at 109. She testified that she can no longer sew because she cannot grasp the needle. See id. Also, she testified that she can no longer prune the roses because she cannot squeeze the pruner. See id. Further, Lapinsky testified that everyday tasks have become a hassle. See id. at 110. She has trouble buttoning her clothing, grasping gallons of milk, holding coffee cups and writing for long periods of time. See id. 109-10. Lapinsky also testified that she has trouble performing household chores such as vacuuming and scrubbing floors. See id. In an affidavit submitted by Lapinsky, she also states the following: her husband helps her dress and undress; she has broken most of her china as a result of her inability to grip or hold with her right hand; and she tries and fails to do household chores; eating with utensils with her right hand is difficult and sometimes impossible. See Aff. Of Laurine E. Lapinsky. Based on evidence in the record, the Court concludes that Lapinsky has a raised a genuine issue of material fact whether she is substantially limited in the major life activity of performing manual tasks. Lapinsky’s testimony, taken

as true, indicates that the injury is a severe and is permanent impairment that resulted from the 1995 injury. As a result, the Court denies the Union's Motion for summary judgment on whether Lapinsky has a physical impairment that substantially limits one or more of the major life activities of Lapinsky.

B. QUALIFIED INDIVIDUAL WITH A DISABILITY

A two-part test is used to determine whether someone is "a qualified individual with a disability." 29 C.F.R. pt. 1630, App. at 353-54; See Gaul, 134 F.3d at 580. First, the court must consider whether "the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc." 29 C.F.R. pt. 1630, App. At 353-54; Gaul, 134 F.3d at 580. Second, the court must consider "whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation." 29 C.F.R. pt. 1630, App. At 353-54; Gaul, 134 F.3d at 580. "The determination of whether an individual with a disability is qualified is made at the time of the employment decision." 29 C.F.R. pt. 1630, App. At 353-54; Gaul, 134 F.3d at 580.

Defendants argue that Lapinsky does not have the necessary skills for the Clerk Typist Position and Lapinsky is not capable of typing, an essential function of the position she sought. After carefully reviewing the record, the Court finds that there is

sufficient evidence to create a genuine issue of material fact whether Lapinsky was a qualified individual with a disability. The job description for the position that Lapinsky sought required stated:

> Duties include, but not limited to preparation, typing, process of business letters, correspondence, reports, Xerox and maintain department files. Prepare, maintain weekly envelopes for mail out of M/W/ bulletins/assignments. All other duties as assigned by the lead clerk. Must have ability to work in a fast paced environment with changing priorities. Be proficient in preparation and processing of business letters and correspondence. Must be proficient on PC, windows and WP6.1. Must possess ability to perform clerical functions including accurate filing, typing, etc.
> **Must be a qualified Typist 50WPM**

See Pl[‘s] Memo. of Law in Opp’n to Def. Nat’l R.R. Passenger Corp.’s Motion for Summ. J., exhibit N. The record demonstrates that Lapinsky passed a typing test in 1986. See Lapinsky Depo., March 31, 2000, at 29. From approximately 1986 until 1996, Lapinsky engaged in various positions that required typing. Furthermore, Thomas Mulvey authored a letter to Amtrak Doctor, H.F. Haase, in which he indicated that Lapinsky’s current position requires “extensive typing and that [her] department was satisfied with the speed and accuracy and ability to perform typical light office duties.” He continued to assert that it would not be a hardship to reasonably accommodate the employee provided the physical condition is clarified as a disability.” Based on the record, Lapinsky raises a genuine issue of material fact whether she is qualified individual with a disability. Accordingly,

summary judgment must be denied on this element.

C. ADVERSE EMPLOYMENT DECISION

Discrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for a plaintiff's disabilities. The ADA specifies that an employer discriminates against a qualified individual with a disability when the employer does "not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer]." 42 U.S.C. § 12112(b)(5)(A) (West 2000).

The ADA's regulations state that "[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3) (West 2001). Similarly, the EEOC's interpretive guidelines provide that "[o]nce a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible,

interactive process that involves both the employer and the [employee] with a disability." 29 C.F.R. Pt. 1630, App. § 1630.9 at 359.

To show that an employer failed to participate in the interactive process, an employee must demonstrate: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Taylor, 184 F.3d 319-20. The analysis of the interactive process in the present case is divided into two steps. Id., 184 F.3d at 312-13. The first step is focused on what type of notice triggers an employer's obligation under the interactive process, while the second step examines the duties of the employee and employer once the interactive process comes into play. Id.

To request an accommodation, an employee may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation." Id. The request need not be in writing but must make clear that the employee wants assistance for his or her disability. Id. Put simply, the employer must know of both the disability and the employee's desire for accommodation of the disability. Id.

Here, Lapinsky has presented evidence, that when viewed in the

light most favorable to her, supports her claim that Amtrak knew of her disability and her desire for accommodation. See Lapinsky Depo., at 57, 64; Mulvey Depo., at 21-22, 24, 32; Plaintiff's Memo. of Law, exhibit J. In addition, Lapinsky has presented evidence, that when viewed in the light most favorable to her, supports her claim that the Union knew of her disability and her desire for accommodation. See Finn Depo. July 6, 2000, at 75-76.

Once the interactive process has been triggered, the employer must make a reasonable effort to identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations.[6] Taylor, 184 F.3d at 316. In short, the interactive process requires that employers make a good-faith effort to seek accommodations. Id. at 317. An employer can show good faith in a number of ways including: meeting with the employee who requests an accommodation, asking the employee what he or she specifically wants, and offering and discussing available alternatives when the request is too burdensome. Id. Additionally, permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by the employee's disability. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1999).

Here, one could find from Lapinsky's evidence, if credited,

[6] The ADA provides that reasonable accommodations can include "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position ..." 28 U.S.C. § 12111(9)(b); 29 C.F.R. 1630.2(o)(2)(ii).

that Amtrak failed to make a good faith attempt to respond to Plaintiff's request for accommodation. In January 1998, Plaintiff approached Mulvey and expressed a desire to work for him in a clerical position. See Mulvey Depo., at 27-29. Lapinsky informed Mulvey that the position of Revenue Accounting Clerk was causing her physical discomfort. See Lapinsky Depo., at 57. Lapinsky informed Mr. Mulvey that her neck was as tight as a drum, she could barley turn her head, her arm ached and her back ached in performing the duties. See id. In addition to Lapinsky's disability, she also discussed her ability to pass and complete the typing test. See id. at 61. Mr. Mulvey was familiar with Lapinsky's clerical and typing skills. See Mulvey Dep., at 28. Lapinsky offered to take the typing test, but Mr. Mulvey told her that the test would only show her disability and not her capability. See Lapinsky Depo., at 61. At that time, Mulvey stated that the concern should be addressed through the ADA forum. See Mulvey Dep., at 30. Mr. Mulvey spoke to Lapinsky's supervisors in an effort to ascertain her work performance, the physical aspect of her job and the typing aspect of her job, so that an investigation could be conducted to see if her claims fell under the ADA. See id. 21-22, 32. Mulvey also spoke with Bruce Poulet and John Cerquoni, managers at Amtrak. See id. at 24. Mulvey informed them that Lapinsky was a satisfactory employee who performed all the general administrative type functions including typing and light

filing. See id. at 25. Lapinsky desired to be accommodated by holding a job in Mulvey's department for a thirty day probationary period without a typing test to determine her ability to do the job despite her inability to type at her former pace. See Lapinsky Depo., at 64. On January 29, 1998, Mulvey wrote Dr. Haase and Ms. Tierney, the individual responsibilities for conducting the ADA investigation, and indicated that he believed that it would not be a hardship to reasonably accommodate Lapinsky. See Pl['s] Memo. of Law in Opp'n to Def. Nat'l R.R. Passenger Corp.'s Memo. of Law, exhibit J. Mulvey also provided them with a description of the circumstances surrounding the request. See id. On February 2, 1998, Mulvey left a message with Tierney regarding the status of the January 29, 1998 memorandum. See Mulvey Depo, at 37. On February 27, 1998, Mulvey spoke with Dr. Haase who stated that Lapinsky was entitled to some accommodation based on her disability. See id. at 34-37. On February 28, 1998, Lapinsky learned that Amtrak declared her disabled and that a position of Purchase Order Clerk was open. See Lapinsky Depo., at 66. As a result, Lapinsky contacted Tierney and informed her of the open position. See id. Tierney stated that she would contact Mulvey, Pat Hansen and the Union, and that she should put her bid in. See id.

On March 12, 1998, Tierney informed Lapinsky that she would have to take the typing test per Union rules and the results would

be addressed later. See id. at 67. Lapinsky was never told that if she did not pass the typing test, they would make an effort to place her in the position. See id. at 68. Lapinsky informed Tierney that she could not take the test because she was scared, on new medicine for depression, which was causing her difficulty, and that she had a bad hand. See id. at 67-68. Lapinsky was subsequently placed on medical leave on March 12, 1998 because she was unfit to work based upon her emotional problem, depression and panic attacks. See id. at 78. The Court concludes that Lapinsky raises a genuine issue of material fact whether Amtrak failed to reasonably accommodate her.

The Court also finds that there is sufficient evidence on the record, if credited, to raise a genuine issue of material fact whether the Union failed to make a good faith attempt to respond to Lapinsky's request for accommodation. Lapinsky's Union Representative Finn testified that if a member of the Union makes a complaint, Finn is to investigate the situation and determine whether any violation exists. See Finn Depo., at 14. If a violation exists, he has the responsibility to file the grievance. See id. at 15. Finn further testified that the Union as the collective bargaining unit for employees has challenged the typing test on numerous occasions with respect to the issues raised in Lapinsky's case. See Pl.['s] Memo. of Law in Opp'n to Union's Mot. for Summ. J., at 21. The Union raised grievances on two occasions

for employees who had last held positions requiring typing over a year before applying to another position that required typing. See id. These individuals were given the position without taking the typing test. See id. (citation omitted). Based on these facts, the Court finds that there is sufficient evidence in the record, if credited, to create a genuine issue of material fact whether the Union in good faith attempted to respond to Lapinsky's request for accommodation. Thus, because the Court finds that there is a genuine issue of material fact whether Amtrak and the Union acted in good faith in the interactive process, the Court denies summary judgment on this issue.

Because federal courts treat PHRA claims as coextensive with the ADA, the Court's holding above will apply to Lapinsky's PHRA claim in Count II of her Complaint. See Kelly v. Drexel Univ. 94 F.3d 102, 105 (3d Cir. 1996).

IV. Plaintiff's Duty of Fair Representation Claim

In Count III of Lapinsky's Complaint, she alleges that the Union "breached its fiduciary duty to her by failing to properly represent her and by discriminating against her due to her disability." See Pl.['s] Compl. ¶ 58. The Union argues that Lapinsky's claim falls outside the limitations period for duty of fair representation actions. See Def. Union's Memo. of Law in Support of Mot. for Summ. J., at 16. The Union asserts that Lapinsky's claim is subject to the six month limitations period set

forth by the United States Supreme Court in DelCostello v. Teamsters, 462 U.S. 151 (1983). See id. To the contrary, Lapinsky argues her claim is subject to Pennsylvania's two year limitation period for fiduciary breaches. See Pl.['s] Memo. of Law in Opp'n to Def. Union's Mot. for Summ. J., at 25-27. Based on the analysis below, the Court agrees with the Union and will apply the six month limitations period to Lapinsky's Duty of Fair Representation claim.

Initially, the Court notes that there is no federal statute of limitations expressly applicable to Lapinsky's claim of breach of the duty of fair representation. See Williams v. Dist. 1199C, Civ.A. 99-CV-1425, 1999 WL 391572, *1 (E.D. Pa. June 15, 1999). Where no federal statute of limitations applies, "[courts] generally [conclude] that Congress intended that the courts apply the most closely analogous statute of limitations under state law." DelCostello, 462 U.S. at 158. "Although federal courts should ordinarily borrow from state law when there is no federal statute of limitations expressly applicable to the cause of action, '[i]n some circumstances, state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law.'" See Williams, 1999 WL 391572, *1 (quoting DelCostello, 462 U.S. at 161). "There are instances in which the application of a state statute of limitations could potentially 'frustrate or interfere with the implementation of national policies.'" Id. at *2. "When such is the case, the Supreme Court has recognized a narrow

exception to the general rule of borrowing from state law." See id. "[The Court declines] to borrow a state statute of limitations only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking'." Reed v. United Transp. Union, 488 U.S. 319, 324 (1989).

In DelCostello, the Court concluded that the six month federal statute of limitations under § 10(b) of the National Labor Relations Act ("NLRA") was the appropriate law to apply in cases involving a "hybrid" § 301/duty of fair representation claim brought against both the plaintiff's employer for breach of contract and the representative union for the breach of the duty of fair representation. See Williams, 1999 WL 391572, *2. As the Court explained, application of a state statute of limitations in these actions could allow "disputes involving critical terms in the collective-bargaining relationship between company and union" to remain unresolved for long periods of time. Id. at *2 (citing DelCostello, 462 U.S. at 168-69). The six month provision of § 10(b), on the other hand, was more appropriate for these types of actions because it represented the proper balance between "national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside

what he views as an unjust settlement under the collective bargaining system." Id. at *2 (citing DelCostello, 462 U.S. at 171).

Here, the Union contends that the reasoning in DelCostello applies and that the six month statute of limitations provision of § 10(b) of the NLRA thus bars Lapinsky's claim. See Def. Union's Memo. of Law in Support of Mot. for Summ. J., at 16-19. In response, Lapinsky argues that DelCostello is not applicable to this case because the allegations against the Union relate to a "dispute within a Union that do[es] not affect labor-management relations." See Pl.['s] Memo. of Law in Opp'n to Union's Mot. for Summ. J., at 26. Lapinsky cites Brenner v. Local 514 United Brotherhood of Carpenters, 927 F.2d 1283, 1295 (3d Cir. 1991) and Kilpatrick v. Sheet Metal Workers Int'l Assn. Local Union No. 19, Civ.A. 96-4862, 1996 WL 635691, *1 (E.D. Pa. Oct. 30, 1996), to support her contention that Courts have only applied the six month limitations period to cases where the claims against the Union challenge the Union's performance of its duties vis-a-vis the employer. See Pl.['s] Memo. of Law in Opp'n to Union's Mot. for Summ. J., at 26.

The Court concludes that Lapinsky's reliance on Brenner and Kilpatrick is misplaced and the six month limitations period applies. In Brenner the Third Circuit refused to extend the DelCostello rationale to internal Union disputes that do not affect

labor-management relations. The Court in Brenner states "that the interest in the rapid resolution of labor disputes does not outweigh the union member's interest in vindicating his rights when . . . a dispute is entirely internal to the union." See Brenner, 927 F.2d at 1295. The Court continued that if the dispute has "no more then an indirect influence on the union's ability to negotiate effectively with those employers who hire [the union members] though the hiring hall, [then] we conclude that the rationale behind DelCostello's narrowly circumscribed exception is inapplicable." See id. The Third Circuit remanded the case to the District court where it ordered the court to apply the most closely analogous Pennsylvania statute of limitations to the plaintiff's claim. In Kilpatrick, the District court found that the case was similar to Brenner and thus also applied a state statute of limitations. Neither Brenner nor Kilpatrick involved allegations of wrongdoing by the employer. While both Brenner and Kilpatrick stand for the proposition that in a case where the dispute is "entirely internal to the union" the state statute of limitation shall apply, that is not the factual situation before this Court.

Here, Lapinsky was employed by Amtrak and was seeking the assistance of the Union to secure relief from one of the terms of employment set by Amtrak. See Pl.['s] Memo. of Law in Opp'n to Union's Mot. for Summ. J., at 6-13. Amtrak's policy requires an employee, who has not held a typing position for a year or more, or

does not have a valid test on file, to be tested before being awarded a bid position. See id., exhibit F. Under Lapinsky's version of the facts in this matter, "Plaintiff spoke to her Union Representative Thomas Finn regarding the placing of the typing requirement into the position of Computer Tech I. See Pl.['s] Memo. of Law in Opp'n to Union's Mot. for Summ. J., at 8 (citations omitted). During this conversation, Lapinsky informed Finn that she wanted typing in the position because she could not pass the typing test. See id. At this time, Finn informed Lapinsky that he could not help her. See id.

Subsequently, Lapinsky requested an accommodation from Amtrak. See id. at 11. Lapinsky asserts that her "Union Representative Finn spoke with [her] and learned that Mulvey was placing a request for disability determination under the ADA. See id. at 11. Finn contacted Mulvey to learn the status of the disability determination. See id. No further action was taken by Finn. See id. (citations omitted). Lapinsky asserts that these facts demonstrate the failure of the Union to pursue her grievance against Amtrak and that such failure to act amounts to a breach of the duty of fair representation.

Lapinsky attempts to fashion these facts as a challenge to the Union's internal ADA procedures. See id. at 26. The typing requirement, however, was a condition of employment established by Amtrak. See id. exhibits E-F. Furthermore, the Union does not

have an ADA procedure. See Finn Depo., at 58-59. Lapinsky's Union Representative Finn testified that if a member of the Union makes a complaint, Finn is to investigate the situation and determine whether any violation exists. See Finn Depo. at 14. If a violation exists, he has the responsibility to file the grievance. See id. at 15. Finn further testified that the Union, as the collective bargaining unit for employees, has challenged the typing test on numerous occasions with respect to the issues raised in Lapinsky's case. See Pl.['s] Memo. of Law in Opp'n to Union's Mot. for Summ. J., at 21. The Union raised grievances for employees on two occasions who had typing over a year before applying to the position and were given the position without taking the typing test. See id. (citation omitted). Based on these facts, the Union would have to necessarily engage the employer Amtrak in order to meet its duty of fair representation. These facts indicate that Lapinsky's allegations against the Union involve the Union's conduct vis-a-vis Amtrak and therefore the concerns of DelCostello are directly implicated. Accordingly, the Court will apply the six month statute of limitations to Lapinsky's claim against the Union.

In a breach of the duty of fair representation, the statute of limitations begins to run when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation. See Hersh v. Allen Products

Co., 7889 F.2d 230, 232 (3d. Cir. 1986). On March 12, 1998, Lapinsky was informed by Tierney that she would have to take the typing test. See Lapinsky Depo., at 67. Lapinsky thereafter was placed on medical leave and remains on medical leave to the present. See Pl[‘s] Memo. of Law in Opp’n to Union’s Mot. for Summ. J., at 13. Because Lapinsky was informed that she was required to take the typing examination on March 12, 1998 and the Complaint in this case was filed on July 15, 1999, the Court concludes that Lapinsky’s claim is barred by the statute of limitations and summary judgment is granted as to Count III of Lapinsky’s Complaint.

V. Plaintiff’s claim of self-dealing

Count IV of Lapinsky’s Complaint alleges that “[t]he conduct of [the] Union permitted Defendant Amtrak to continue its unlawful and discriminatory practices against Plaintiff in violation of the Americans with Disability Act of 1990, as amended. Said conduct amounted to self-dealing.” See Pl.[‘s] Complaint, ¶ 60. In the Union’s motion for summary judgment, it asserts that Lapinsky’s allegation of self-dealing is pre-empted and alternatively lacks merit. Lapinsky has expressly refused to address the Union’s argument on the merits of Lapinsky’s self dealing claim. See Pl[‘s] Memo. of Law in Opp’n to Union’s Mot. for Summ. J., at 1, n.1.

The Union in this case has the initial burden of showing the

basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Ultimately, the moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. See id. at 325. Once the Union adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party, Lapinsky, to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324.

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant, here Lapinsky. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, the Court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992). The court's inquiry at the summary judgment stage is the threshold inquiry of determining whether there is need for a trial, that is, whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. See

Anderson, 477 U.S. at 250-52.

Here, Lapinsky's failure to discuss the Union's motion for summary judgment on the merits of her self-dealing claim indicates to the Court that she is resting upon the allegations against the Union made in Plaintiff's Complaint. Assuming Plaintiff's claim has not been pre-empted, the Court concludes that there is no disagreement on the merits and the Union is entitled to summary judgment on Count IV of Lapinsky's Complaint.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAURINE E. LAPINSKY	:	CIVIL ACTION
	:	
v.	:	
	:	
AMTRAK COMMUTER SERVICES CORP., ET AL.	:	NO. 99-3575

O R D E R

AND NOW, this 28th day of February, 2001, upon consideration of Defendant National Railroad Passenger Corporation's Motion for Summary Judgment and accompanying Memorandum of Law (Docket No. 18), Defendant Transportation Communications International Union's Motion for Summary Judgment (Docket No. 14) and accompanying Memorandum of Law (Docket No. 15), Plaintiffs' Response to Defendant National Railroad Passenger Corporation's Motion for Summary Judgment (Docket No. 20), Plaintiffs' Response to Defendant Transportation Communications International Union's Motion for Summary Judgment (Docket No. 21), Defendant Transportation Communications International Union's Reply Memorandum (Docket No. 24) and Defendant National Railroad Passenger Corporation's Reply Memorandum (Docket No. 25), IT IS HEREBY ORDERED that:

1. Defendant Transportation Communications International Union and Defendant National Railroad Passenger Corporation's Motions for Summary Judgment on Count I of Plaintiff's Complaint are **DENIED**.
2. Defendant Transportation Communications International Union and Defendant National Railroad Passenger

Corporation's Motions for Summary Judgment on Count II are **DENIED**.

3. Defendant Transportation Communications International Union's Motion for Summary Judgment on Count III is **GRANTED**.

4. Defendant Transportation Communications International Union's Motion for Summary Judgment is **GRANTED**.

BY THE COURT:

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HERBERT J. HUTTON, J.